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No. 00-353

IN THE

SUPREME COURT OF THE UNITED STATES

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner,

- v. -

NEWTOWN TOWNSHIP AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

REPLY OF RESPONDENTS TO MOTIONS FOR LEAVE TO FILE AND BRIEFS OF AMICI CURIAE DOBSON COMMUNICATIONS CORPORATION, SPRINT SPECTRUM , L.P. AND AT&T WIRELESS SERVICES, INC., NEXTEL COMMUNICATIONS, INC., AND SBC WIRELESS, INC.

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Pending before the Court are Motions for Leave to File as Amici Curiae by Dobson Communications Corporation (hereinafter "Dobson Motion"), Sprint Spectrum, L.P. (hereinafter "Sprint Motion"), and AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc. (hereinafter "AT&T Motion"). Each Movant is a wireless telephone company; other than in the Sprint Motion, none of the Movants purports to assert any interest in any way different than that raised by Petitioner Omnipoint Communications, L.P. (hereinafter "Omnipoint") in its original Petition for Certiorari. In fact, the Sprint Motion claims a differing interest on a basis not relevant to this case. In the absence of any new perspectives to be brought by these Movants, their participation adds nothing to what has already been raised by Omnipoint.

Movants claim that the Third Circuit's decision misconstrues the ability of wireless telephone users to communicate using competing carriers' transmission facilities. In fact, nothing in the Third Circuit's decision indicates any such misapprehension. To the contrary, as argued in Respondent's Brief in Opposition to the Petition for Writ of Certiorari of Omnipoint, the Third Circuit construed the "effect of prohibiting" provision in the Telecommunications Act in a way required by the statutory language. Rather than assuming that wireless telephone users can make or receive phone calls regardless of which carrier's antenna is established in a given area, the Third Circuit recognized that a zoning decision in an individual case cannot have an effect of prohibiting wireless service wherein in fact wireless service is established in an area whether it be by one carrier or another.

The primary position urged by each of the Movants is that the Third Circuit's decision will somehow be anti-competitive in that, according to the Movants, once one wireless carrier has established a presence in a locality, local zoning authorities can deny further zoning applications with impunity. Sprint's claim is that their status as the "incumbent"carrier in the Newtown Township area therefore brings them their differing perspective on this case. This spectre of unlimited competition raised by the Movants was addressed in Omnipoint's Petition for Writ of Certiorari.

The concern that an incumbent carrier either alone or in collusion with municipal authorities could prevent additional carriers from establishing transmission sites in a given locality ignores the full context of the Telecommunications Act. The Statute provides:

"(7) Preservation of local zoning authority
(A) General authority

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) [Omitted]
>
> (iii) Any decision by a State or local government or instrumentality to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

It is also important to remember that the case now before the Court on Omnipoint's Petition for Writ of Certiorari is a case in which the proposed antenna and electronic facilities to be erected by Omnipoint were violative of the local zoning ordinance and other sites establishing such facilities are available under the zoning ordinance.

The Statute does not expand the "effect of prohibiting" protection to carriers by requiring that it have the effect of prohibiting service by a particular carrier. Protections to the disappointed wireless carrier seeking to establish a transmission facility in a given locality include the requirement that a decision must be made promptly, the requirement that any decision must be supported by substantial evidence and the provision that local municipalities must not discriminate among carriers.

Clearly, in the event that there is activity by an entrenched carrier either alone or in collusion with a municipality to block out competing carriers, the anti-discrimination provision would be called into play. Again, factually, it bears repetition that a competitor of Petitioner Omnipoint had been previously denied in its application to erect a cell phone facility at this same location in this case.

Any wireless carrier which desires to establish a transmission facility in a given locality must first start with proposing a facility which is compliance with applicable zoning. Omnipoint did not do so in this case.

In the event that a wireless carrier makes an application, whether it is the first carrier to establish a site in a given locality or is a newcomer, the application must be ruled on promptly. Any denial must be based on substantial evidence subject to review by the Federal Courts under the Act. Neither Petitioner Omnipoint nor any of the amici indicate how an incumbent carrier either alone or in collusion with a municipality could contrive to a denial of an application to erect a facility that would pass muster under the substantial evidence review applicable in the district courts.

Finally, in the event that any such a denial could somehow pass muster under the substantial evidence review standard, neither Petitioner Omnipoint nor any of the amici address the anti-discrimination provisions in the statute which would clearly be brought into play if subsequent applicants seeking zoning permission to erect a telecommunications facility were treated differently than any incumbent carrier.

As argued heretofore by Respondents, this case represents a poor factual scenario for resolving any questions under the "effect of prohibiting" provisions of the Telecommunications Act. Here, clearly, in addition to the requested site prohibited under the zoning ordinance, several sites

available for erection of telecommunications facilities were available under the zoning ordinance of Newtown Township. Sprint's own argument that it has a facility in place shows as much. In addition, there was substantial evidence in the record that any of these additional sites would be satisfactory for Petitioner's Omnipoint's needs.

Finally, although they seek leave to intervene in the case, none of the Movants bring any new perspectives to the attention of the Court and, in fact, they fail to provide any indication of what they would request this Court to establish as the applicable standard. The only exception is in the AT&T Motion which suggests: "For the prohibition to have any efficacy, it must be applied in a manner that permits each provider to erect facilities necessary to provide service to its subscribers." (AT&T Motion at pg. 16). If this is the position to be urged to this Court by the Movants, it will be a position directly contrary to the legislative history of the statute indicating that local zoning authority is to be preserved. Movants argue that the Third Circuit's construction of the "effect of prohibiting" provision in the statute would somehow grant carte blanche to incumbent carriers and/or municipalities to deny zoning applications; they would apparently replace that situation with carte blanche of their own to erect facilities regardless of local zoning ordinances in contravention of the will of Congress as set forth in the recognition of the retention of local zoning authority as set forth in the Telecommunications Act.

For all of the foregoing reasons it is respectfully submitted that the Motions should be denied.

Respectfully submitted,

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Dated: October 16, 2000

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CERTIFICATE OF SERVICE

I, BRUCE A. IRVINE, ESQUIRE, attorney for Newtown Township and the Zoning Hearing Board of Newtown Township, hereby certify that I am a member of the Bar of this Court and on this 16th day of October 2000, I served three copies of the Reply of Respondents to Motions for Leave and Briefs of Amici Curiae Dobson Communications Corporation, Sprint Spectrum, L.P and AT&T Wireless Services, Inc., Nextel Communications, Inc., and SBC Wireless, Inc. by United States First Class Mail, postage prepaid, upon the required parties listed below pursuant to Rule 29 of the Rules. I hereby certify that all required parties have been served.

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